

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANISSA P.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. 2:19-cv-01993-BAT

**ORDER REVERSING THE
COMMISSIONER AND REMANDING**

Plaintiff appeals the ALJ's decision finding her not disabled. She contends the ALJ misevaluated the medical evidence, her testimony, and her residual functional capacity. For the reasons below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

On August 29, 2017, Plaintiff filed a Title II application for a period of disability and disability insurance benefits. Plaintiff also protectively filed a Title XVI application for supplemental security income on August 23, 2017. In both applications, Plaintiff alleged disability beginning June 24, 1998. These claims were denied initially on November 12, 2017, and upon reconsideration on February 27, 2018. Thereafter, Plaintiff filed a written request for hearing on April 26, 2018 (20 CFR 404.929 et seq. and 416.1429 et seq.). Plaintiff appeared and

1 testified at a hearing held on December 4, 2018. Daniel McKinney Sr., a vocational expert, also
2 appeared at the hearing. On January 24, 2019, the ALJ issued a decision finding Plaintiff not
3 disabled. Tr. 15.

4 Utilizing the five-step disability evaluation process,¹ the ALJ found, at Step One, that
5 Plaintiff had not engaged in substantial gainful activity since June 24, 1998. Tr. 20. At Step Two,
6 the ALJ found that Plaintiff has the following severe impairments: chronic fatigue syndrome;
7 hearing loss; depression; anxiety; and obesity. Tr. 21. At Step Three, the ALJ found that
8 Plaintiff's impairments did not meet or equal the requirements of a listed impairment.² Tr. 21-22.
9 The ALJ determined that Plaintiff has the residual functional capacity ("RFC") to perform light
10 work as defined in 20 CFR 404.1567(b) and 416.967(b) with additional limitations, including for
11 example, that she can "understand, remember and carry out simple repetitive tasks in 2-hour
12 increments throughout the 8-hour workday." Tr. 22.

13 At Step Four the ALJ noted that Plaintiff has no past relevant work. Tr. 26. At Step Five,
14 the ALJ found that because there are jobs that exist in significant numbers in the national
15 economy that Plaintiff can perform, Plaintiff is not disabled. Tr. 26-27.

16 On October 11, 2019, the Appeals Council denied review and Plaintiff timely filed the
17 complaint in this Court. Tr. 1-6.

18 DISCUSSION

19 A. Medical Opinion Evidence

20 The ALJ is required to consider all the evidence in the record when making a disability
21 determination. *See* 20 C.F.R. § 404.1520(a)(3). In March 2017, the SSA amended its regulations
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23 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 regarding the evaluation of medical evidence for claims filed on or after March 27, 2017. 20
2 C.F.R. § 404.1520c. Under the new regulations, the Commissioner "will not defer or give any
3 specific evidentiary weight, including controlling weight, to any medical opinion(s) . . . ,
4 including those from [a claimant's] medical sources." 20 C.F.R. § 404.1520c(a). The amended
5 regulations provide that when the Commissioner evaluates the persuasiveness of medical
6 opinions and prior administrative medical findings, the most important factors are supportability
7 and consistency. *Id.* While the Commissioner is required to explain how he considered the
8 supportability and consistency factors, the Commissioner may, but is not required to, explain
9 how he considered other factors in determining persuasiveness. 20 C.F.R. § 404.1520c(b)(2)).

10 1. Nancy Thordarson, M.D.

11 Dr. Nancy Thordarson is Plaintiff's treating pediatrician. On April 15, 2018, she opined
12 that Plaintiff met the 2015 IOM diagnostic criteria for chronic fatigue syndrome ("CFS"). Tr.
13 378. Dr. Thordarson concluded that Plaintiff's daily functioning is "severely impacted by her
14 CFS and her associated medical conditions" and in particular, found that Plaintiff has been
15 unable to sustain any activity for more than one to two hours at a time without debilitating
16 fatigue and prolonged recovery times. *Id.* Dr. Thordarson also stated that Plaintiff has "had little
17 change in her functioning despite years of extensive medical evaluations and medical
18 interventions" and she concluded that "disability benefits for this patient are appropriate and
19 strongly recommended." *Id.*

20 On April 18, 2018, Dr. Thordarson completed a RFC form in support of Plaintiff's claim
21 for disability benefits. Tr. 776. She opined that Plaintiff would have frequent symptoms severe
22 enough to interfere with the performance of even simple work tasks; that Plaintiff is incapable of
23 performing even "low stress" jobs as she is only capable of sustaining a maximum of one to two

1 hours of physical activity in a single day; Plaintiff could not tolerate eight hours of work, and she
2 would need 48 hours of recovery time after any activity. Tr. 777. Dr. Thordarson further opined
3 that Plaintiff would be absent more than four days per month. Tr. 778.

4 The ALJ accorded minimal weight to Dr. Thordarson's opinions because the ALJ found
5 that her treatment notes are inconsistent with the extreme limitations assigned and Plaintiff's
6 daily activities. Tr. 24.

7 (a) Inconsistent Treatment Notes

8 The ALJ points to an October 2017 treatment note in which Dr. Thordarson indicated that
9 Plaintiff "was feeling better and able to be more active recently" and had normal adolescent
10 growth and development, and a September 2017, physical examination with "benign results." Tr.
11 24. The ALJ does not explain, however, how these are inconsistent with Dr. Thordarson's
12 opinion that Plaintiff can sustain only one to two hours of activity before experiencing
13 debilitating fatigue. Tr. 780. During the October visit, Dr. Thordarson also noted that Plaintiff's
14 sleep remained irregular, she was "fatigued during the day," and her "activities are limited by
15 fatigue." *Id.* Plaintiff reported she had a "goal of walking to [the] bus stop," which was only a
16 "couple of blocks away". AR 349, 780. Three months earlier, Plaintiff reported she "occasionally
17 has a day with some energy now, but [is] unable to predict day or duration" and continues to
18 have "disabling fatigue after attempts at activity." Tr. 580. Plaintiff does not allege that she is
19 totally disabled every day, but that she has good and bad days. Tr. 218. On good days, she can
20 get dressed, go to the store, or go on a short outing (*id.*), but on bad days, she is too exhausted
21 and will spend those days in bed. Tr. 262. Dr. Thordarson's opinions are also consistent with
22 reports of Plaintiff's ADLs, third-party ADLs (Plaintiff's mother), treatment notes, and
23 testimony at the hearing. Tr. 239; 288; 42.

1 The ALJ also fails to explain how Plaintiff's "normal adolescent growth and
2 development" and the September 2017 benign physical examination results undermines Dr.
3 Thordarson's medical opinions regarding the symptoms of CFS.

4 (b) ADLs

5 The ALJ also concluded that Plaintiff's activities (babysitting, doing laundry, preparing
6 simple meals, playing video games, watching television shows and YouTube, singing, and
7 reading videos) undermine Dr. Thordarson's opinions regarding the ability of Plaintiff to work.
8 Tr. 24. However, Plaintiff's ADLs, testimony at hearing, and reports cited by the ALJ are
9 consistent with Dr. Thordarson's opinion noting good days, bad days, and long periods of
10 recovery with any exertional activity.

11 Activities of daily living can support an adverse credibility determination when the
12 subjectively reported limitations are inconsistent with the claimant's daily activities. *Orn v.*
13 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Two grounds exist to find that activities suggest the
14 claimant is not credible: (1) the activities contradict the claimant's testimony or (2) the activities
15 are performed in a manner suggesting transferable work skills. *Id.* However, "the mere fact that a
16 plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited
17 walking for exercise, does not in any way detract from his credibility as to his overall disability.
18 One does not need to be "utterly incapacitated in order to be disabled." *Vertigan v. Halter*, 260
19 F.3d 1044, 1049 (9th Cir. 2001).

20 The ALJ stated that Plaintiff has been babysitting two children for a family friend about
21 once every three months for *ten hours* each time. Tr. 24 (emphasis added). The parties agree that
22 the ALJ was incorrect as Plaintiff testified that she has been babysitting two children for the past
23 eight years, about once every three months, for about *two hours* on average (the longest being for

1 four hours). AR 45 (emphasis added). Plaintiff also testified she often declined offers to babysit
2 due to fatigue. Tr. 46.

3 Defendant concedes that the ALJ erred in finding that Plaintiff babysat for ten hours at a
4 time, but argues that the error was harmless because babysitting for two hours at a time was
5 enough to support the ALJ's finding that Plaintiff is capable of concentrating in two-hour
6 increments. Dkt. 15 at 5. This is an oversimplification of the ALJ's finding. The ALJ stated that
7 the 10 hours of babysitting were "consistent with the RFC limitation of understanding,
8 remembering and carrying out simple repetitive tasks in 2-hour increments, and dealing with
9 simple workplace changes, at the very least." Tr. 24. As correctly noted by Plaintiff, the ALJ's
10 reasoning here makes sense only if she was considering a period longer than two hours, which
11 would have allowed her to analyze Plaintiff's ability to sustain concentration over the course of
12 an entire day. Plaintiff's ability to babysit one day every three months for about two hours does
13 not support a conclusion that she is capable of full-time work. *See Lester v. Chater*, 81 F.3d 821,
14 833 (9th Cir. 1996) (The Commissioner must consider whether the claimant is unable to work on
15 a "sustained" basis, and a claimant's occasional symptom-free period or the ability to work
16 sporadically is not inconsistent with disability).

17 In addition, Plaintiff's ability to babysit once every three months for about two hours
18 does not contradict Dr. Thordarson's opinion that Plaintiff could not "regularly perform any job
19 that requires more than a couple hours of mental or physical functioning" or tolerate eight hours
20 of work without needing up to one week to recover from such activity. Tr. 777, 779.

21 The ALJ also concluded that Plaintiff's ability to do her own laundry, prepare simple
22 meals, play video games, watch television and YouTube videos, and sing and read are additional
23 proof that Plaintiff is not as limited as Dr. Thordarson's opinion that Plaintiff could not sustain

1 any physical activity for more than one to two hours at a time, lift 10 pounds occasionally, or sit
2 more than two hours in an eight-hour workday. Tr. 24. The record reflects however, that the
3 chores, video games, YouTube videos and reading, which for the most part are sedentary
4 activities, were not performed on a full-time basis and can be performed without lifting any
5 significant weight. *See* Tr. 41, 218-19, 266. Plaintiff reported that activities such as sweeping,
6 picking up her own things, putting dishes away, and doing her laundry were performed less than
7 ten minutes per chore, one to four times per week, all depending on how she felt on any
8 particular day. Tr. 218-219. She also testified that she mostly sleeps during the day but if she has
9 the concentration, she will watch television, YouTube videos, or occasionally play a video game.
10 Tr. 41. She testified that she is able to prepare basic food and do her own laundry if she has “the
11 energy to do it. If I do not, then I cannot.” Tr. 42.

12 The ALJ did not give legally sufficient reasons for rejecting Dr. Thordarson’s opinion
13 and her failure to do so is not harmless error as the vocational expert testified that employers will
14 not even tolerate one day of work missed per month or more at unpredictable times. Tr. 61.

15 (2) Kavitha Chunchu, MD

16 In October 2018, new treating physician Dr. Kavitha Chunchu completed a physical RFC
17 assessment in support of Plaintiff’s disability claim. Tr. 1009. Dr. Chunchu reported that Plaintiff
18 had diagnoses of chronic fatigue, major depressive disorder, panic attacks and anxiety. *Id.* She
19 opined that Plaintiff’s symptoms would constantly interfere with attention and concentration
20 needed to perform even simple work tasks and that she was incapable of performing even a “low
21 stress” job; that Plaintiff would be able to sit more than two hours at a time, at least six hours per
22 day, but would need to sleep in a bed after sitting for some time; and could stand and walk for
23 fifteen minutes at a time for less than two hours total in an eight-hour day. Tr. 1010. *Id.* Dr.

1 Chunchu further opined that Plaintiff is currently not able to work due to fatigue and that she
2 would be absent more than four days per month. Tr. 1012.

3 The ALJ assigned Dr. Chunchu's opinion "some weight only," concluding that the
4 statement was inconsistent with the provider's notes for that contemporaneous period. Tr. 24-25.
5 Specifically, the ALJ noted that Dr. Chunchu recorded "mostly benign results except for
6 fatigue." Tr. 25. However, Dr. Chunchu was specifically addressing chronic fatigue syndrome
7 and a normal musculoskeletal examination does not contradict an allegation of chronic and
8 debilitating fatigue.

9 The ALJ also stated, "Dr. Chunchu specifically wrote that 'in her current state [the
10 claimant] is able to be functional in the workplace." Tr. 25. The entirety of Dr. Chunchu's
11 statement, however, reflects that this is likely a typographical error and Dr. Chunchu meant to
12 state "is *not* able to be functional." The treatment note cited by the ALJ reads, in its entirety,
13 "D/w pt and mother that I will complete her current paperwork. Given her sx, agree in her
14 current state she is able to be functional in the workplace." Tr. 1006. However, as noted by
15 Plaintiff, the "paperwork" Dr. Chunchu is referring to is the October 2018 RFC statement, in
16 which Dr. Chunchu concluded that Plaintiff is "currently *not* able to work based on fatigue." Tr.
17 1011 (emphasis added). Defendant argues that it was up to the ALJ to interpret the evidence and
18 that she did so in a reasonable manner. However, it was not a reasonable interpretation because it
19 was at odds with Dr. Chunchu's findings on the RFC form that Plaintiff's symptoms would
20 constantly interfere with attention and concentration needed to perform even simple work tasks
21 and that she was incapable of performing even a "low stress" job. Tr. 1010.

22 The ALJ also reiterates her findings that the Plaintiff's self-reported activities undermine
23 Dr. Chunchu's opinion. Tr. 25. However as discussed, Plaintiff's ability to engage in these

1 activities on a sporadic basis is not inconsistent with Dr. Chunchu's opinion concluding that
2 Plaintiff was "[c]urrently not able to work based on fatigue" and that on average, Plaintiff would
3 likely be absent from work more than four days per month. Tr. 1011-1012.

4 Based on the foregoing, the Court finds that the ALJ did not give legally sufficient
5 reasons for rejecting Dr. Chunchu's opinion, particularly in light of the vocational expert's
6 opinion regarding absenteeism.

7 (3) Margaret Cunningham, Ph.D.

8 In July 2017, Dr. Margaret Cunningham completed a psychological evaluation of
9 Plaintiff. Tr. 584. The examination included a mental status examination and testing (the BDI-II
10 and the BAI). Dr. Cunningham opined that Plaintiff had marked limitations in ability to function
11 in the following areas: understand, remember, and persist in tasks by following detailed
12 instructions; adapt to changes in a routine work setting; communicate and perform effectively in
13 a work setting; maintain appropriate behavior in a work setting; complete a normal work day and
14 week without interruption from psychologically based symptoms; and set realistic goals and plan
15 independently. Tr. 597.

16 The ALJ gave this opinion "little weight" because Dr Cunningham did not review
17 Plaintiff's medical records and instead, relied on Plaintiff's self-reports; and because her
18 opinions were contrary to Plaintiff's self-reported activities and Dr. Chunchu's clinic entry that
19 Plaintiff is able to be functional in the workplace. Tr. 25. The import of Plaintiff's self-reported
20 activities and that of Dr. Chunchu's clinic entry have previously been discussed. In short,
21 Plaintiff's occasional participation in sedentary activities is not contrary to Dr. Cunningham's
22 opinion that Plaintiff would have marked limitations in the ability to complete a normal workday
23 or contrary to Dr. Chunchu's opinion that Plaintiff's symptoms would constantly interfere with

1 the attention and concentration needed to perform even simple work tasks and that she was
2 incapable of performing even a “low stress” job.

3 The ALJ also discredited Dr. Cunningham’s opinion because she “did not indicate that
4 she had reviewed any of the claimant’s medical records, but instead had relied on the claimant’s
5 self-report.” Tr. 25. An ALJ may reject a psychiatric opinion that relies “to a large extent” on a
6 claimant’s subjective report, rather than on objective measures such as clinical observations and
7 mental status examinations. *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017); *Turner v.*
8 *Comm’r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010). Here, the record reflects that Dr.
9 Cunningham did not rely solely on Plaintiff’s self-reports, but also a clinical interview, testing
10 including the BAI and BDI-II, and a Mental Status Examination. Tr. 584-593. Dr. Cunningham
11 concluded that Plaintiff’s score on the BAI revealed a severe range of generalized anxiety and
12 her score on the BDI-II revealed a severe range of major depression. Tr. 589. Although Dr.
13 Cunningham noted that the BDI-II is a “self-report instrument” she also noted that she routinely
14 reads the items to her clients and explains terminology they may not understand. *Id.*

15 Based on the foregoing, the Court finds that the ALJ did not give legally sufficient
16 reasons for rejecting Dr. Cunningham’s opinions.

17 (4) Dr. Merry Alto, MD

18 The ALJ gave “significant weight” to state-agency consultant Dr. Merry Alto as being
19 “consistent with the totality of medical records, including Plaintiff’s self-reported activities and
20 consistency of evidence on record.” Tr. 26.

21 At reconsideration, Dr. Merry Alto opined that Plaintiff had the residual functional
22 capacity to lift 20 pounds occasionally, 10 pounds frequently, stand and/or walk (with normal
23 breaks) for a total of two hours, and sit (with normal breaks) for a total of about six hours in an

1 eight-hour workday. Tr. 116. However, Dr. Alto also concluded that “[c]hronic fatigue and
2 abdominal pain would cause occasional absences.” Tr. 117.

3 The Social Security Regulations defines “occasional” as “occurring from very little up to
4 one-third of the time.” SSR 83-10, SSR 83-14, SSR 96-9p. The ALJ does not explain why this
5 portion of the opinion was rejected or why she included no limitation regarding absenteeism in
6 Plaintiff’s RFC. This was error as the vocational expert testified at the hearing that an individual
7 who missed “one day of work per month or more at unpredictable times is not likely to maintain
8 employment.” Tr. 61. The ALJ also stated that “Dr. Alto rated the claimant’s RFC at ‘light,’
9 which has been adopted in this decision.” Tr. 25. However, Dr. Alto concluded that Plaintiff has
10 the ability to perform sedentary work. Tr. 120.

11 Based on the foregoing, the Court finds that the ALJ erred in failing to consider the
12 limitations of absenteeism and sedentary work in Plaintiff’s proposed RFC and absenteeism.

13 B. Plaintiff’s Symptom Report

14 Absent evidence of malingering, the Commissioner must provide “clear and convincing”
15 reasons for rejecting a claimant’s testimony. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
16 1998), citing *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir. 1995). “General findings are
17 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence
18 undermines the claimant’s complaints.” *Reddick*, 157 F.3d at 722, quoting *Lester*, 81 F.3d at 834;
19 *Dodril v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

20 At the outset, Defendant argues generally that the ALJ appropriately discounted
21 Plaintiff’s subjective complaints due to the lack of medical evidence covering the first sixteen
22 years of Plaintiff’s life. Dkt. 15 at 3. In this regard, the ALJ stated only, “[e]ven though the
23 claimant is alleging disability since birth, the evidence of records contains medical documents

1 from 2017 onwards.” (Tr. 23). The ALJ made no further findings and did not specifically state
2 how this detracts from Plaintiff’s credibility or other medical evidence. In addition, records prior
3 to age 18 are not relevant to the current Childhood Disability Benefits (CDB) claim and DDS did
4 not obtain records prior to June 23, 2016 (Plaintiff’s 18th birthday). Tr. 69; *See Moore v.*
5 *Commissioner*, 278 F.3d 920, 925 (9th Cir. 2002) *quoting* 42 U.S.C. § 402(d)(1)(B)(ii) (To be
6 eligible for disabled child’s benefits, the claimant must “at the time [the] application [is] filed”
7 be “under a disability.”)

8 The ALJ concluded that, “[d]espite the allegation of functional impairments at a disabling
9 degree, [plaintiff] is engaging in age-appropriate activities that reflect an ability to perform her
10 RFC despite some limitations.” Tr. 23. First, the ALJ noted that Plaintiff was able to babysit for
11 10 hours at a time. As previously discussed, this was error.

12 Next, the ALJ discredits Plaintiff’s testimony because Plaintiff engages in “age-
13 appropriate activities” such as playing video games, watching television, watching YouTube
14 videos, singing, and reading. Tr. 24. The ALJ does not mention Plaintiff’s testimony that she
15 would “mostly sleep,” but if she had the concentration, she would watch television or YouTube
16 videos and occasionally play a video game. Tr. 39-41. The ALJ also does not explain how
17 Plaintiff’s engagement in these sedentary activities translates to full-time and competitive work.

18 At the hearing, the ALJ asked, “Do you participate on Facebook?” and Plaintiff
19 responded, “I do, yes.” Tr. 41. From this testimony alone, the ALJ concludes that Plaintiff’s use
20 of Facebook indicates a level of computer skills and concentration sufficient for staying
21 connected with others.” Tr. 24. It was error for the ALJ to make this assumption as there is no
22 evidence for how often or long Plaintiff uses her computer for Facebook, whether she has help
23 using the computer, or the amount of people with whom she stays connected.

1 Next, the ALJ points to Plaintiff's mother's statement that Plaintiff "gets together with
2 extended family once every two months, and that she can follow both spoken and written
3 instructions 'very well' with 'no problems.'" Tr. 24. The ALJ does not however, refer to
4 Plaintiff's mother statement that Plaintiff can only work on completing tasks for about five
5 minutes at a time. Tr. 245. Moreover, the ability to see family members once every two months
6 is not inconsistent with Plaintiff's allegations of chronic and unpredictable fatigue that prevents
7 her from sustaining any activity on a full-time basis and the need for long periods of recovery
8 after expending energy. Tr. 261, 262. Here, the ALJ erred by using only specially selected
9 statements from the third-party ADLs to "further reinforce the RFC as found," while ignoring the
10 remainder of the form that remains supportive of Plaintiff's allegations. Tr. 24.

11 As "additional support" for the ALJs decision, Defendant cites to medical visits in 2014
12 and 2015 to suggest that Plaintiff's fatigue can be explained by Plaintiff's participation in on-
13 screen activities. Dkt. 15 at 4-5. However, these visits were not referenced or relied on by the
14 ALJ and are technically outside the relevant time period (age 18 to 22 years). The August 2014
15 visit also indicates that Plaintiff has an irregular sleep schedule and "she awakens at various
16 times in the morning and is napping several days of the week." Tr. 349. The October 2015 visit
17 documented Plaintiff with a flat affect, reporting chronic pain and fatigue. Tr. 426.

18 As further "additional support" for the ALJ's conclusions, Defendant cites a January
19 2016 physical therapy visit documenting that Plaintiff was independent in self-care activities and
20 activities of daily living (Dkt. 15 at 5) but that same visit documented that Plaintiff requires
21 "increased time to complete daily activities to the point of only completing activities 2-3 times
22 per week" and Plaintiff reportedly would "sit/lie down for most of the day in bouts for 4-5
23 hours." Tr. 431. Defendant also cites a June 2016 note finding that Plaintiff continued to perform

1 her daily chores. Dkt. 15 at 5. This visit was a follow up on her “chronic fatigue and pain which
2 have limited her physical activity and general functioning.” Tr. 330.

3 Defendant also cites several examples within the record to suggest that Plaintiff’s
4 “disordered sleeping” patterns and a “random sleep schedule” may be attributed to the amount of
5 time Plaintiff spends on her computer and phone. Dkt. 15 at 5-6. The ALJ did not reference or
6 rely on these examples, except as to Dr. Thordarson’s note that Plaintiff’s “sleep was still
7 irregular and the claimant uses her phone at night and then feels fatigued during the day
8 (8F/14).” But the ALJ also acknowledged that Dr. Thordarson attributed Plaintiff’s fatigue and
9 mood to disorganized sleep. Tr. 24.

10 Because the ALJ did not mention or conclude that Plaintiff’s computer use undermined
11 her claim of fatigue or disorganized sleep, Defendant’s suggestion is merely a post-hoc
12 rationalization for the ALJ’s decision. *See Connet v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)
13 (“We review only the reasons provided by the ALJ in the disability determination and may not
14 affirm the ALJ on a ground upon which he did not rely.”)

15 For these reasons, the Court finds that the ALJ erred in her assessment of Plaintiff’s
16 testimony and that the errors undermine the ALJ’s RFC findings.

17 C. New Evidence Submitted to the Appeals Council

18 Plaintiff submitted two post-hearing statements to the Appeals Council in support of her
19 claim: (1) a statement from Compass Health, documenting the number of missed appointments
20 Plaintiff had between May 2018 up through April 2019, as evidence of Plaintiff’s excessive
21 absenteeism (Tr. 9) and, (2) a statement from Becky Murdoch, the family friend for whom
22 Plaintiff occasionally babysat, as proof of the duration and frequency of Plaintiff’s babysitting
23 activities (Tr. 8). The Appeals Council found “this evidence does not show a reasonable

1 probability that it would change the outcome of the decision. We did not exhibit this evidence.”

2 Tr. 2.

3 A district court may remand a case to the Commissioner for consideration of new,
4 material evidence. *See Clem v. Sullivan*, 894 F.2d 328, 332 (9th Cir. 1990). Evidence is material
5 “only where there is a reasonable possibility that the new evidence would have changed the
6 outcome of the [Commissioner’s] determination had it been before him.” *Booz v. Sec’y of Health*
7 *and Human Servs.*, 735 F.2d 1378, 1380 (9th Cir. 1984) (quotation marks and citation omitted);
8 see also 42 U.S.C. § 405(g).

9 Because the Court is reversing and remanding the ALJ’s decision for the reasons set forth
10 herein, the new evidence may be considered by the ALJ in the first instance on remand.

11 CONCLUSION

12 As discussed above, the ALJ harmfully erred in finding plaintiff not disabled. Plaintiff
13 contends the Court should remand the case for an award of benefits. Remand for an award of
14 benefits should be ordered only in the rare case in which the record is susceptible to no further
15 development and no reasonable jurist would disagree that the claimant is disabled. This is not
16 such as rare case as the opinions of numerous doctors and the testimony of plaintiff must be
17 reassessed and reweighed. These are tasks reserved to the Commissioner and the Court declines
18 to take these tasks on appeal in the first instance. Accordingly, the Court orders that the
19 Commissioner’s final decision is **REVERSED** and this case is **REMANDED** for further
20 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

21 On remand, the ALJ shall reassess Plaintiff’s testimony, reassess the opinions of Drs.
22 Thordarson, Chunchu, Cunningham, and Alto, develop the record and redetermine Plaintiff’s
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1 RFC as needed and proceed to the remaining steps of the disability determination process as
2 appropriate.

3 DATED this 17th day of June, 2020.

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6 BRIAN A. TSUCHIDA
7 Chief United States Magistrate Judge
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